October 16, 2015

Attention: Business Law Policy Consultation
Consumer and Business Policy Unit
Ministry of Government and Consumer Services
5th Floor, 777 Bay Street
Toronto, ON M7A 2J3

Sent by email to: businesslawpolicy@ontario.ca

Re: Consultation on Business Law Agenda Report

We are writing in response to the Government of Ontario's request for comments on the *Business Law Agenda: Priority Findings and Recommendations Report*.[1]

With approximately C$6 billion in assets under management, NEI Investments' approach to investing incorporates the thesis that companies integrating best environmental, social and governance (ESG) practices into their strategy and operations will build long-term sustainable value for all stakeholders and provide higher risk-adjusted returns to shareholders.

In this submission we explain our perspective on various issues relating to the business law agenda, with the understanding that some may best be addressed through amendments to the Ontario Business Corporations Act (OBCA), while others may be dealt with more effectively through securities regulation or stock exchange listing requirements. Given the jurisdictional complexities, we encourage Ontario to work with securities regulators and the Toronto Stock Exchange (TSX) to ensure that business law issues are, as far as possible, handled consistently and through the most appropriate legislative or regulatory channels.

NEI Investments is a stakeholder in a number of large, publicly-traded companies incorporated under OBCA. We would like to see the recommendations below applied to those companies. We recognize, however, that some of our recommendations relate specifically to the protection and rights of shareholders of large corporations, and may therefore be less relevant for smaller entities incorporated under OBCA. It is reasonable that expectations for large publicly-traded companies should be higher in some respects because they have a greater impact on markets, and it is also important to ensure that requirements for smaller publicly-traded companies do not become a barrier to initial listing. It should also be taken into consideration that large privately-held companies, and companies operating in Ontario but incorporated elsewhere or listed on non-Canadian exchanges, may also have significant impacts for Ontario stakeholders.

NEI Investments is a member of the Canadian Coalition for Good Governance (CCGG), and offers the following comments in addition to perspectives provided by CCGG.

[1] Government of Ontario (2015). Business Law Agenda: Priority Findings and Recommendations Report. http://www.ontariocanada.com/registry/showAttachment.do?postingId=18942&attachmentId=28451

Key Recommendations

Our key recommendations can be summarized as follows:

- The purpose of the corporation and the role of directors should be articulated more clearly in OBCA, focusing on the imperative of creating long-term sustainable value, and based on stakeholder theory.
- Shareholder rights provisions within OBCA could be enhanced by mandating the advisory vote on executive compensation; requiring all vote results to be disclosed and presented in a fair and consistent way; and allowing shareholder proposals that have gained a minimum level of support to be re-filed the following year.
- Sustainability considerations should be integrated to the business law agenda. Specifically, OBCA should address the corporate "responsibility to respect" human rights set out in the 2011 UN Guiding Principles on Business and Human Rights; and based on precedents in Canada and other jurisdictions, and in coordination with CSA and TSX, we see scope for some aspects of ESG disclosure to be mandated under OBCA, at least for larger companies.

Report Recommendation 1: Process for review of Ontario business statutes

We agree that a regular process for review of business statutes should be instituted, to allow for prompt integration of emerging good practices. In this context, we would like to highlight the importance of targeting the institutional investment community specifically for input on potential amendments. Various networks exist through which the province can reach institutional investors in Canada and internationally, including CCGG, the Responsible Investment Association (RIA), the International Corporate Governance Network (ICGN) and the Principles for Responsible Investment (PRI).

Report Recommendation 2a: Ontario Business Corporations Act

Electronic meetings (Recommendation 2a.i)

We agree with the panel that OBCA should be updated to reflect the impact of new technology on communications. We also welcome the efforts by many issuers to provide the opportunity for more shareholders to participate in the AGM through electronic means such as webcasts. However, we do not believe companies should be permitted to limit shareholder meetings to electronic format, as this significantly reduces the opportunity for shareholders to interact and communicate directly with directors and management.

The purpose of the corporation and the role of directors (Recommendation 2a.ii)

We believe the purpose of the corporation and the role of directors should be articulated more clearly in OBCA, focusing on the imperative of creating long-term sustainable value for stakeholders, including shareholders. It is a widespread belief that the main purpose and obligation of a publicly-traded company, and by extension the key duty of its directors, is to benefit shareholders by maximizing the share price. This "shareholder primacy" perspective has been the dominant theory of the firm for several decades. While shareholder primacy drives much investment thinking, its legal foundations are weak. Stakeholder theory holds that the purpose of the corporation is to create value for all its stakeholders. It has found support in law, management theory and from many people who actually run

companies. Taking the long view and considering the interests of a broad set of potential beneficiaries can reduce risks, lower costs and allow exploitation of opportunities that contribute to long-term value.[2]

Section 134 (1) of OBCA states: *"Every director and officer of a corporation in exercising his or her powers and discharging his or her duties shall (a) act honestly and in good faith with a view to the best interests of the corporation; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."* [3] Nowhere does OBCA state that the interests of shareholders are to be placed above all others. Legal precedents relating to the Canada Business Corporations Act (CBCA), which contains a very similar definition of the duty of directors, seem to support this interpretation. In Peoples Department Stores Inc. (Trustee of) v. Wise, the Supreme Court of Canada ruled: *"[I]t is clear that the phrase the 'best interests of the corporation' should be read not simply as the 'best interests of the shareholders'…We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments, and the environment."*[4] In BCE Inc. v. 1976 Debentureholders, the Supreme Court of Canada reiterated that the interests of stakeholders beyond shareholders might be taken into account, and also found that*"[w]here the conflict involves the interests of the corporation, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen."*[5]

Although the current language of OBCA appears consistent with stakeholder theory, and the Supreme Court rulings on CBCA cases appear to reinforce this interpretation of similar language, much discourse on the purpose of the corporation and the role of directors continues either to promote shareholder primacy, or to support managerial entrenchment at the expense of shareholders. We believe, therefore, that it would be helpful to provide an enumeration of the duties of directors that is more specific, encompassing a long-term perspective and the need to consider the interests of a range of stakeholders. An example of such an approach can be found in Section 172 of the U.K. Companies Act, which sets out a list of possible considerations in promoting *"the success of the company for the benefit of its members as a whole*", including long-term consequences, the interests of a range of stakeholders, impacts on the community and the environment, and the company's reputation.[6]

We also note that OBCA does not address corporate business ethics directly, beyond the discussion of the duty of directors noted above. Many listed companies choose to publish a code of ethics, guided by National Policy 58-201 *Corporate Governance Guidelines*[7] and National Instrument 58-101 *Disclosure of Corporate Governance Practices*.[8] However, adopting a code of ethics is a guideline, rather than an obligation; and the associated disclosure requirements are based on a comply-or-explain model. From

[2] More detail on our perspective on the stakeholder theory/shareholder primacy debate can be found in the following report: NEI Investments (2012). Crisis, What Crisis? https://www.neiinvestments.com/Documents/Research/Exec_Comp_English_Final.pdf
[3] Government of Ontario. Business Corporations Act, R.S.O. 1990, c. B.16 http://www.ontario.ca/laws/statute/90b16
[4] CanLII. Peoples Department Stores Inc. (Trustee of) v. Wise, 2004 SCC 68, [2004] 3 SCR 461. http://www.canlii.org/en/ca/scc/doc/2004/2004scc68/2004scc68.html
[5] CanLII. BCE Inc. v. 1976 Debentureholders, 2008 SCC 69, [2008] 3 SCR 560. http://www.canlii.org/en/ca/scc/doc/2008/2008scc69/2008scc69.html
[6] Companies Act 2006 http://www.legislation.gov.uk/ukpga/2006/46/section/172
[7] http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20050617_58-201_corp-gov-guidelines.jsp
[8] http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20050617_58-101_disc-corp-gov-pract.jsp

automobile manufacturers concealing technical problems to corruption in tendering for international business, corporate ethical failures can result in significant harm to stakeholders, including losses to shareholders, as well as bringing the jurisdictions in which the affected companies are registered into disrepute. A greater emphasis on ethics within the business law agenda would be desirable.

In this context, we would also like to draw attention to the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (MNEs),[9] which have been endorsed by the Government of Canada and provide recommendations on principles and standards for responsible business conduct. The Guidelines reflect good practice for all companies, including both MNEs and domestic enterprises, and provide a useful base for discussion of the purpose and responsibilities of corporations.

We believe there would be value in further consultation on the purpose of the corporation, the role of directors and the promotion of sound business ethics under OBCA and other Canadian corporate statutes.

Determining the composition of the board (Recommendation 2a.iii)

Director elections

We support annual election of individual directors, and allowing shareholders to vote "against" directors. Slates obstruct shareholders from voting against individual directors for performance issues such as poor board attendance or poor decision-making on a specific board committee. The only option in such cases is to vote against the whole board, or conduct a costly proxy fight. Shareholder interests are best served by mandating that voting on director candidates should be conducted on an individual basis. Under the plurality voting system, whereby "withhold" votes are discounted, directors can be elected without receiving a majority of shareholder votes – indeed, a single vote in favour of a director nominee is all that is required for election. Where director nominees are also shareholders, they can be elected on the basis of their own votes. Once again, this prevents shareholders from voting against specific under-performing directors. We believe shareholder interests are best served by mandating a system in which director nominees require the support of the majority of votes cast to be elected. Under recently enacted TSX requirements, individual director elections must be held on an annual basis, based on a majority voting policy. We are not aware of any major negative impacts of the TSX requirements, and therefore see no obstacle at this point to granting shareholders the right to vote "against". We believe reform in this area will enhance the image of Canadian markets internationally: in March 2011 we co-led a global group of investors representing U.S. $832 billion in assets under management in writing to the Ontario Securities Commission, calling for requirements on individual director elections and majority voting.[10]

Residency requirements

The report recommends dropping Canadian residency requirements for directors. We recognize the merits of the argument that globally-operating companies need the flexibility to be able to recruit

[9] Organization for Economic Co-operation and Development (2011). Guidelines for Multinational Enterprises. http://mneguidelines.oecd.org/text/

[10] NEI Investments/SHARE (2011). Staff Notice 54-701 Regulatory Developments Regarding Shareholder Democracy Issues http://www.neiinvestments.com/neifiles/PDFs/5.5%20Public%20Policy%20and%20Standards/UNPRI%20Signatory%20submission%20to%20OSC_Staff%20Notice%2054-701.pdf

directors globally. Nevertheless, based on the stakeholder theory of the firm, we believe Ontario should seek a solution that addresses the importance of including directors on the board who understand the current legal, cultural and operating environment in the jurisdiction of incorporation, as well as in other key jurisdictions in which the company operates. One option would be to consider replacing the residency requirements with provisions aimed at ensuring that the range of director expertise represented on the board is adequate in relation to the scope of the financial and non-financial risks and opportunities facing the company. For example, we strongly prefer that companies should disclose a director skills matrix, allowing shareholders to ascertain rapidly which characteristics and areas of expertise are considered important, and which members of the board are considered to possess them.

Board diversity

We would like to commend Government of Ontario for its role in initiating regulatory efforts on gender diversity of boards and senior management. This has led to the adoption of diversity disclosure requirements that in practice affect all large listed companies in Canada. We view diversity of boards and senior management as a driver of long-term value, as well as an ethical issue. Our perspective on the value of diversity embraces not only gender and ethnicity but also other attributes such as aboriginal status, sexual orientation and disability, as well as representation of different age groups. We would therefore encourage Ontario to consider expanding the range of its diversity focus. In addition, we advocate for companies to recruit directors with wider diversity of experience and expertise, including environmental, social and governance issues that are material to the business.

Progress on board diversity in Canada has been slow – even in the face of evidence that bringing women onto the board correlates with company outperformance. With emerging market jurisdictions such as India already taking action on gender diversity, we are concerned that Canada risks falling into a laggard position.[11]

We felt that addressing diversity through the CSA corporate governance frameworks would allow the issue to be addressed within a context that is already familiar to boards and management of public companies, and would cover all larger TSX-listed companies. We were cautiously optimistic that establishing requirements for diversity disclosure, and providing guidance on recommended diversity policies and practices, would be an effective means to achieve the objective of increased diversity, as it would push more companies to put the issue on their agenda. The rate of increase in the representation of women on boards in Canada has accelerated somewhat since consultation on the requirements began. Nevertheless, according to research[12] by the Canadian Securities Administrators into the disclosure of 722 companies that were required to report by July 2015, more than half (51%) still have no women directors; only 14% clearly disclosed the existence of a written policy on board diversity; and only 7% had set targets for representation of women on the board.

We recognize the reality that in the first year of new governance requirements, many companies will be uncertain about how to approach disclosure, looking to sector leaders to provide examples of good practice that could be replicated in subsequent years. Nevertheless, if companies do not seize the opportunity provided by the present comply-or-explain requirements to improve the quality of their

[11] The Indian Companies Act, 2013 s.149 includes a provision that *"such class or classes of companies as may be prescribed, shall have at least one women director."* http://egazette.nic.in/WriteReadData/2013/E_27_2013_425.pdf

[12] Canadian Securities Administrators (2015). CSA Multilateral Staff Notice 58-307 -Staff Review of Women on Boards and in Executive Officer Positions – Compliance with NI 58-101 Disclosure of Corporate Governance Practices http://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20150928_58-307_staff-review-women-boards.htm

diversity disclosure and practice, jurisdictions including Ontario should consider mandating further specific actions.

Separation of Chair and CEO

We strongly favour separation of the Chair and CEO roles, especially at large, widely-held companies with potentially significant impacts on markets and stakeholders. We are concerned that the combined role represents (or may be perceived to represent) a power concentration that undermines the independence of the board and its ability to hold management to account, even where a substantial majority of the other directors are independent.

Beneficial owners (Recommendation 2a.iv)

The report recommends clarifying the rights and remedies available to beneficial owners. In earlier submissions to securities regulators and to the consultation on CBCA reform, we expressed concern that objecting beneficial owner (OBO) anonymity presents an obstacle to the transparency that should be a key feature of a well-functioning proxy voting system, as well as to investors exercising their full rights and responsibilities as stakeholders in public companies. In jurisdictions other than the U.S. and Canada, issuers are permitted to communicate directly with all their shareholders. We believe that removal of OBO status would promote improved reconciliation of ownership by issuers. At the very least, OBO status could be removed after the record date to facilitate reconciliation. At the same time, provision should be made to ensure that those who prefer to vote electronically and minimize receipt of paper documentation are able to do so. NEI Investments has OBO status primarily to facilitate electronic voting and to avoid receiving unnecessary documents, rather than because of a desire for anonymity. From a corporate engagement perspective, we would prefer increased transparency for issuers seeking to ascertain if we hold a position in the company. On numerous occasions issuers have told us that they cannot verify our holdings at their end of the system, which can be an obstacle to dialogue.

Further recommendations

Shareholder rights

Advisory vote on executive compensation

We believe the advisory vote on executive compensation should be mandatory for larger publicly-traded companies. OBCA may be an appropriate vehicle to implement this.

Compensation is one driver for corporate behaviour: inevitably, the attitude of management and employees toward risk will be influenced by the way they are rewarded. Appropriate compensation frameworks incentivize effective risk management and help to build long-term sustainable value. We believe that mandating the advisory vote on executive compensation – "Say on Pay" – would be in the interests of shareholders. A Say on Pay vote helps to focus the attention of investors on the quality of compensation disclosure and practice. It also gives shareholders a targeted way to provide feedback to companies on the crucial issues of compensation policy and practice. Without it, we can only express dissent by withholding support from one or more of the directors who serve on the compensation committee, or from the board as a whole. This is problematic if we view the directors concerned as otherwise valuable to the board. We prefer a mechanism that allows us to send a direct message about

the specific topic of executive compensation. As most boards make compensation decisions annually, we believe that Say on Pay votes should also be conducted annually.

Where Canadian companies are offering Say on Pay on a voluntary basis, compensation votes have not proven to be disruptive, and we have observed significant progress in compensation disclosure and practice at these companies, although there is still much room for improvement. As a result, our current Proxy Voting Guidelines now include a guideline to withhold our vote for the incumbent Chair of the Board at companies that do not offer shareholders Say on Pay.

Internationally, a number of jurisdictions have mandated some form of Say on Pay, including the U.S., the U.K. and Australia. We are concerned that Canada may be seen as lagging on this issue. Although more than 140 companies had adopted the advisory vote on a voluntary basis by mid-2015,[13] we are concerned that Canada may be seen as lagging on this issue. Compensation disclosure requirements are not a substitute for giving shareholders the opportunity to vote on pay. As the advisory vote is an agenda item and proposal at the Annual General Meeting (AGM), it seems appropriate to address this issue through OBCA, which sets out procedure on proposals, voting and the conduct of shareholder meetings.

We note that the question of mandating the advisory vote on executive compensation was raised by the Ontario Securities Commission (OSC) during its consultations on shareholder democracy in 2011. Although OSC has not followed up as yet, we emphasize the need for coordination on this topic with securities regulators and with TSX.

Shareholder proposals

Occasionally, we file shareholder proposals to advance our corporate engagement goals. We have a strong preference for dialogue, but when company is not willing to engage, or we have a difference of opinion that cannot be resolved, we may file a shareholder proposal to establish the views of other investors. For us, this is not the first choice. Nevertheless, we regard the right to file a shareholder proposal as a fundamental tenet of shareholder democracy.

In most respects, we consider the rules for filing of shareholder proposals in Ontario to be acceptable. We indicated in our submission to the recent CBCA consultation that it would simplify matters if the deadline for submitting a shareholder proposal under CBCA could be harmonized with the provincial approach, referencing the anniversary of the last AGM. We suggested that consideration could be given to harmonizing the permitted number of words allowed in a shareholder proposal across the various federal and provincial acts providing for incorporation of companies. We also believe it would be appropriate to ensure that proponents have a reasonable length of time to present proposals at the AGM. This could take the form of a minimum time allotment that must be offered, and a maximum time after which the Chair could intervene to end the presentation. As a proponent, we strive to ensure that our presentation is completed within five minutes, even if more time has been allowed by the Chair, as a courtesy to the company and other shareholders.

One aspect of the OBCA regulations on shareholder proposals that should be reviewed is the requirement for re-submitting a shareholder proposal: namely, that the same proposal may not be re-submitted within two years if it has been defeated at the AGM. By contrast, under CBCA the proposal

[13] Hay Group (2015). Executive Briefing: More Canadian Companies are Adopting Say on Pay. http://www.haygroup.com/downloads/ca/Executive%20Briefing_August%202015.pdf

may be re-submitted at subsequent meetings if it achieves a minimum level of support that increases from year to year.[14] Based on our knowledge of proxy voting practice, it may take several years for a strong shareholder proposal on a new issue to gain widespread support among institutional investors. Given the reality that many other shareholders vote with management without giving detailed consideration to the merits of items on the ballot, it is extremely difficult for a shareholder proposal that has not received management support to achieve a majority. Yet an upward trend in support for such a proposal, even if it falls short of a majority, may provide important guidance to the company in determining whether to take action on the issue raised. We therefore suggest that OBCA could follow the example of other jurisdictions in adopting a "minimum level of support" approach for determining whether a defeated shareholder proposal may be re-submitted within a defined time period.

Voting disclosure

We believe it is appropriate to address voting procedure and disclosure issues through OBCA, which sets out procedure on conduct of the AGM. We note that TSX has already implemented requirements on director vote results disclosure. Prompt and accurate vote result disclosure should be encouraged at all public companies, no matter how small. We would support additional requirements to ensure that the outcome of all votes is not only disclosed, but presented in a fair and consistent way. OBCA states that the result of a vote on a proposal *"shall be decided by the majority of votes cast"* (s.97). This is less straightforward than it seems. It is our understanding that the way in which different types of votes ("for", "against" and "abstain") are added together to determine the outcome of a vote is set out in bylaws, and may vary from company to company. We note that several shareholder proposals have been filed in the U.S. over recent seasons at companies perceived to have inconsistent or unfair practices in this area. We would prefer to see consistency across all companies in our holdings. Further consultation may be required to establish a common framework for representation of results in Canada, but our current position is that non-votes should not be included in the denominator nor considered as votes in support of management, and "abstain" votes on shareholder proposals should be reported separately, and not added to the total of votes either "for" or "against" a proposal. When we abstain on a shareholder proposal, generally it is because we consider the topic of the proposal to be important, but in our opinion neither the solution put forward by the proponent nor the rebuttal by the company is fully convincing. In this situation, our abstention is a considered and deliberate act, and we explain our viewpoint in our proxy voting disclosure.

In general, we are opposed to the creation of multiple share classes with different voting rights. Where this situation exists, we recommend a requirement for separate disclosure of the vote results for each class of shares. This would make transparent any divergence between the perspectives of shareholders in each class.

Over-voting and empty voting

The Canadian Securities Administrators (CSA) have been exploring the problems of over-voting and empty voting, both of which undermine the integrity of the proxy voting system.[15] We believe reforming lending practices could contribute to addressing these issues. NEI Investments has a policy prohibiting securities lending, as this can affect our ability to vote on important issues on behalf of our

[14] Government of Canada. Canada Business Corporations Regulations. http://laws-lois.justice.gc.ca/eng/regulations/SOR-2001-512/index.html

[15] Canadian Securities Administrators (2013). Consultation Paper 54-401 Review of the Proxy Voting Infrastructure. http://www.osc.gov.on.ca/en/NewsEvents_nr_20130815_csa-proxy-voting.htm

unit holders, as well as diminishing the value of our holdings by the very short selling that we would be enabling through share lending. While a market-wide ban on securities lending may be problematic because of broader liquidity concerns, we believe regulators should consider restricting the process of recalling shares by the lender after the record date, unless it is for trading purposes only, to ensure that voting rights are retained by the possessing entity (either the lender or borrower) at record date to avoid over-voting. One alternative solution may be to move the record date closer to the meeting date, which is already the case in some jurisdictions. As this would reduce the volume of such recalls, it may nullify most concerns over trading liquidity and reduce over-voting and empty voting, although it would be important to ensure that proxy advisors are still able to provide end-users with research in a timely manner.

We are also concerned at the possibility that, in over-voting situations, shareholders who voted closest to the "cut-off" deadline may be disadvantaged if the last votes to arrive are simply discarded.

To encourage a transition to improved transparency, which may minimize over-voting related to share lending, issuers could be required to disclose in post-meeting voting results the level of over-voting that occurred and the methodology used to determine the final vote tally. If this transparency were provided to investors, confidence in the system would increase as over-voting rates fell over time, eventually eliminating the need to disclose such information.

Integrating sustainability to the business law agenda

We encourage Ontario to consider how sustainability considerations can be integrated to the business law agenda. This is necessary, not only to achieve environmental and social objectives, but also to ensure future market stability and efficiency.

Emerging global sustainability initiatives that call for the participation of policy makers in the business law space include the UN 2030 Agenda for Sustainable Development and Sustainable Development Goals, adopted in September 2015, which encompass the promotion of sustained, inclusive and sustainable economic growth;[16] and the UNEP Finance Initiative Inquiry into the Design of a Sustainable Financial System, released in October 2015 at the IMF/World Bank annual meetings, which calls on policymakers and regulators to integrate sustainable development considerations into financial systems.[17]

In addition to the specific topics outlined below, we highlight our recent submission to the Ontario Ministry of Environment on its Climate Change Discussion Paper, providing our perspective on policy intervention that could benefit both the climate and the economy.[18]

Disclosure on strategic environmental, social and governance matters

We see value in mandating discussion of company priorities and strategy on key environmental, social and governance (ESG) issues. This important context is missing in many company reports. Where

[16] United Nations (2015). Sustainable Development Goals. https://sustainabledevelopment.un.org/topics
[17] UNEP Finance Initiative (2015). The Financial System We Need. http://web.unep.org/inquiry/
[18] NEI Investments (2015). Ontario Ministry of Environment and Climate Change: EBR Registry Number 012-3452 - Climate Change Discussion Paper
http://www.neiinvestments.com/documents/PublicPolicyAndStandards/2015/Ontario%20Climate%20Change%20Consultation%20-%20NEI%20Comments.pdf

companies do outline non-financial risks in financial reporting, the disclosure is often of boilerplate quality.

It is critical to our internal processes that listed companies should provide regular updates on ESG issues, as well as financial information. We are not alone in seeking this information. In 2014, 31% of Canadian assets were managed under some form of responsible investment mandate.[19] Globally, an increasing number of investment institutions are adopting responsible investment practices and beginning to consider ESG risks and opportunities in their decision-making. Over 1380 investment institutions representing assets of US$59 trillion are signatory to the UN Principles for Responsible Investment, which include a commitment to advance ESG reporting.[20] The annual CDP carbon disclosure survey is supported by 822 investors with assets totalling US$95 trillion.[21]

The importance of ESG disclosure to sustainable value generation is illustrated by recent Harvard Business School research findings that companies performing well on material sustainability factors identified in the Sustainability Accounting Standards Board (SASB) reporting standards had enhanced market returns compared to firms that performed poorly on those factors.[22]

Based on precedents in Canada and other jurisdictions, we see scope for some aspects of ESG disclosure to be mandated under OBCA, at least for larger companies. We suggest this should be explored in close coordination with CSA, TSX and other Canadian jurisdictions. Many of Canada's largest publicly-traded companies already provide corporate responsibility reporting, or integrate corporate responsibility information to their annual report, on a voluntary basis. There are emerging precedents for mandating such disclosure for larger companies. In Canada, corporations under the Bank Act, the Insurance Companies Act and the Trust and Loan Companies Act are required to publish Public Accountability Statements including information on specified corporate responsibility matters.[23] Under the U.K. Companies Act (s.417), larger publicly-traded companies must publish a Directors' Report Business Review including information on environmental, social and employee issues.[24] The European Union recently adopted a directive on disclosure of non-financial and diversity information that will apply to around 6000 of Europe's largest companies and groups, reporting from 2017 onwards.[25] Creating requirements for both listed and privately-held large companies to report on key corporate responsibility issues of interest to stakeholders would help to create a level playing field in which companies are not discouraged from listing by the additional reporting requirements.

It has been clarified by both CSA and TSX that "material" environmental, social and governance (ESG) information must be disclosed by listed companies. For continuing listing, according to the *TSX Company Manual*, companies should follow Canadian Securities Administrators (CSA) National Instrument 51-102 *Continuous Disclosure Obligations*. In 2010, CSA published Staff Notice 51-333 *Environmental Reporting*,[26] which highlighted existing requirements to report on environmental issues.

[19] Global Sustainable Investment Alliance (2015). Global Sustainable Investment Review http://www.gsi-alliance.org/wp-content/uploads/2015/02/GSIA_Review_download.pdf
[20] http://www.unpri.org/about-pri/about-pri/
[21] https://www.cdp.net/en-US/Pages/About-Us.aspx
[22] Khan M, Serafeim G & Yoon A (2015). Corporate Sustainability: First Evidence on Materiality. http://www.hbs.edu/faculty/Publication%20Files/15-073_8a7e13e5-68c5-4cc3-a9a0-a132bbef3bc7.pdf
[23] Public Accountability Statements (Banks, Insurance Companies, Trust and Loan Companies) Regulations SOR/2002-133. http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-133/FullText.html
[24] Companies Act 2006. http://www.legislation.gov.uk/ukpga/2006/46/section/417
[25] European Commission (2014). Statement. http://europa.eu/rapid/press-release_STATEMENT-14-291_en.htm
[26] CSA (2010). Staff Notice 51-333: Environmental Reporting Guidance. http://www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20101027_51-333_environmental-reporting.pdf

In its *Primer for Environmental and Social Disclosure,*[27] TSX highlights these requirements, noting that they apply equally to material social issues. It also emphasizes the obligation under the timely disclosure policy to immediately disclose material environmental and social information through a news release. Interpretations of materiality vary, however, and company decisions on which issues to report could vary depending on this interpretation. A further concern is that companies may fail to disclose data consistently from year to year if a topic is not considered a material issue in a particular year. We value annual reporting on a consistent set of indicators as this allows us to perform trend line analysis, as well as to compare companies across sectors.

NEI Investments is a member of an international investor working group associated with the Sustainable Stock Exchanges (SSE) initiative, which promotes the adoption of listing standards by stock exchanges worldwide that would require all public companies to disclose on key ESG risks and opportunities. In September 2015, SSE published guidance for exchanges on how to encourage companies to begin reporting on ESG matters. We draw attention to this document as a possible resource for exploring basic ESG reporting needs.[28]

The corporate "responsibility to respect" human rights

We would like to see OBCA (and other business statutes) address specifically the corporate "responsibility to respect" human rights set out in the 2011 UN Guiding Principles on Business and Human Rights (UNGPs).[29] The UNGPs make it clear that the "responsibility to respect" extends to all businesses: it is *"a global standard of expected conduct for all business enterprises wherever they operate"* (paragraph 11) that *"applies to all enterprises regardless of their size, sector, operational context, ownership and structure"* (paragraph 14).

The UNGPs outline a specific set of actions that companies should undertake (paragraph 15): *"In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including: (a) A policy commitment to meet their responsibility to respect human rights; (b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute."*

It is also specified that the human rights policy should be approved at the most senior level, and embedded throughout the enterprise (paragraph 16).

The present lack of clarity within the basic legal and policy frameworks that govern business behaviour regarding what companies may or must do in order to ensure respect for human rights is highlighted in the UNGPs, with the recommendation that *"laws and policies in this area should provide sufficient guidance to enable enterprises to respect human rights, with due regard to the role of existing governance structures such as corporate boards"* (paragraph 3). Against this background, it would be appropriate and helpful for OBCA to address this topic.

[27] TMX/CPA (2014). A Primer for Environmental and Social Disclosure. http://www.tsx.com/resource/en/73
[28] Sustainable Stock Exchanges (2015). Model Guidance on Reporting ESG Information to Investors. http://www.sseinitiative.org/wp-content/uploads/2015/09/SSE-Model-Guidance-on-Reporting-ESG.pdf
[29] United Nations (2011). Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf

Conclusion

In conclusion, we thank the Ontario Government for seeking stakeholder comments on the business law agenda and reiterate the following recommendations:

- The purpose of the corporation and the role of directors should be articulated more clearly in OBCA, focusing on the imperative of creating long-term sustainable value, and based on stakeholder theory.
- Shareholder rights provisions within OBCA could be enhanced by mandating the advisory vote on executive compensation; requiring all vote results to be disclosed and presented in a fair and consistent way; and allowing shareholder proposals that have gained a minimum level of support to be re-filed the following year.
- Sustainability considerations should be integrated to the business law agenda. Specifically, OBCA should address the corporate "responsibility to respect" human rights set out in the 2011 UN Guiding Principles on Business and Human Rights; and based on precedents in Canada and other jurisdictions, and in coordination with CSA and TSX, we see scope for some aspects of ESG disclosure to be mandated under OBCA, at least for larger companies.

If you have any questions regarding this letter, please do not hesitate to contact **Michelle de Cordova, Director, Corporate Engagement & Public Policy (mdecordova@neiinvestments.com 604-742-8319).**

Sincerely,
NEI Investments

John Kearns
Chief Executive Officer

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CC:
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